TIONG GOON TOON

v.

CREDIT LEASING CORP. SDN. BHD. & ANOTHER CASE

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 3 OF 1984 & NO. PF 69 OF 1984]
20 NOVEMBER 1985

CONTRACT: *Charge documents - Mutual mistake - Intention of parties - Equitable remedy of rectification - Section 30 of Specific Relief Act 1950 - Whether Court should exercise discretion - Doctrine of "frustration".*

EVIDENCE: *Parol evidence - Admissibility - Section 92(a) Evidence Act 1950.*

There were two originating summonses (OS) in this case. OS No. 3 of 1984 was heard first and judgment was reserved. It then came to the Judge's attention that OS No. PF 69 of 1984 which also involved the same parties and similar transaction was pending. The Judge then, because of the nature of the reliefs sought in each case, and also to prevent injustice, decided to hear the later OS before delivering judgment in the earlier OS. The grounds of judgment herein applied to both summonses.

In the first OS the plaintiff as chargor, had charged two pieces of land to the defendant, a leasing company. The plaintiff there sought a declaration that the charge was null and void and for consequential orders to the chargee to execute a valid and registrable discharge of the charge and return to the chargor the relevant documents of title.

In the second OS, the plaintiff was the same defendant/chargee in the first OS and it cited the chargor of 1st OS and another person as 2nd defendant who had earlier and similarly created a similar charge over another piece of land in favour of the plaintiff (the leasing company), who sought amendment of both the charges created by both chargors. The substance of the relief sought was the equitable remedy of rectification of charge documents for both charges. In the 2nd OS, the 2nd chargor also counterclaimed a similar declaration and similar reliefs as those sought by the 1st chargor in the 1st OS.

The Court held that both the chargors and the chargee agreed that due to mutual mistake, the charge documents did not truly express their intention. The Court came to this conclusion after hearing the parties that there was a mistake in framing the charge documents and that the intention of all parties was that the charges were created to secure payment of the rent by the leasing company to the chargee. The issue here was whether the Court should, under s. 30 of the Specific Relief Act 1950 (the Act), exercise its discretion in ordering rectification of the charge documents.

Held:

[1] Parol evidence was admissible here under s. 92(a) of the Evidence Act 1950.

[2] The chargors argued that the leasing agreements were "frustrated" because the machinery, the subject matter of the leasing agreements, was destroyed by fire. The test for the doctrine of frustration was formulated in the House of Lords case of *Davis Contractors Ltd. v., Fareham Urban District Council* [1956] AC 696 at 721 per Lord Reid. Following this test, on a true construction of Article 13, paras. (2) and (4) of the Equipment Leasing Agreement, rent continued to be payable in full after the fire. The charge documents therefore continue

to remain in force because the leasing agreements in question were enough to apply to the situation after the fire but had also stipulated for the destruction of the said machinery for any untoward incident such as fire.

[3] In view of Article 15 of the lease agreement, the insurance money which was paid to the chargee was for purposes not including any indemnity to the leasing company in the matter of rent or arrears of rent the liability for which survived the fire.

[4] The proposed drafts were in serious contradiction with the professed intention of all parties and those drafts were exactly similar in nature to these defective ones and would appear to be even more defective because the drafts were more elaborately drawn to extend to more situations, save the solitary purpose of securing the payment of rent for hire of the machinery.

[5] In all the circumstances, if the remedy of rectification was granted by the Court, it would be an abuse of this remedy if the rectification would take place as proposed.

[6] The Court therefore exercised its discretion by refusing the rectification sought for and granted the declaration that both charges were null and void and ordered, unconditionally, the chargee to execute the relevant valid and registrable discharges of charges and to return the relevant documents of titles.

[Costs to chargors.]

Cases referred to:
Lovell & Christines Ltd. v. Wall [1911] 104 LT 85
Taylor v. Caldwell [1863] 3 B & S 826
Davis Contractors Ltd. v. Fareham Urban District Council [1956] AC 696

Legislation referred to:
Evidence Act 1950, s. 92 proviso (a)
Specific Relief Act 1950, s. 30

In O.S. No. 3 of 1984
For the plaintiff - James Ponniah; M/s. Stanley Ponniah, Ng & Soo
For the defendant - Ravinthran Krishnan; M/s. Ravinthran & Partners.

In O.S. No. PF 69 of 1984
For the plaintiff - Albert Toong; M/s. Ravinthran & Partners
For the 1st defendant - James Ponniah; M/s. Stanley Ponniah, Ng & Soo
For the 2nd defendant - Lim Kem Thuan; M/s. Gill & Tang

JUDGMENT

Peh Swee Chin J:

The two originating summonses (OS) abovementioned were not heard together. OS No. 3 of 1984 having been heard first when judgment thereon was reserved. It then came to my notice that OS No. PF 69 of 1984, involving also the same parties in OS No. 3 of 1984 and the same transaction, or similar transaction was pending. The nature of the reliefs sought in each case was such that to deliver judgment first in OS No. 3 of 1984 without hearing OS No. PF 69 of 1984 might cause an injustice of an irreversible kind unless I decided to and did hear OS PF 69 of 1984 before delivering judgment in OS NO. 3 of 1984. The reasons will become apparent later.

In OS No. 3 of 1984, the plaintiff was the chargor of two pieces of land charged to the defendant, a leasing company. The plaintiff there sought substantially, a declaration that the charge was null and void and for consequential orders to the chargee to execute valid and registrable discharge of the charge and return to the chargor the relevant documents of title.

In OS No. PF 69 of 1984, the plaintiff was the same defendant /chargee in OS No. 3 of 1984 and he cited not only the chargor in OS No. 3 of 1984 in respect of the same charge as first defendant but also another person as second defendant who had earlier and similarly created a similar charge over another piece of land in favour of the plaintiff here, i.e. the same leasing company (the chargee referred to in OS No. 3 of 1984). The plaintiff here (the same leasing company in both OS No. 3 of 1984 and OS No. PF 69 of 1984), sought amendment of both the charges created by both chargors. The substance of the relief sought was the equitable remedy of rectification of charge documents for both charges. I will refer to the leasing company as the Chargee and the chargor in OS No. 3 of 1984 as the 1st Chargee and that other chargor in OS No. PF 69 of 1984 as the 2nd Chargor.

Further in OS No. PF 69 of 1984, the 2nd Chargor also counter-claimed a similar declaration and similar reliefs as those sought by the 1st Chargor in OS No. 3 of 1984 who did not therefore restate his claim for the same by way of counterclaim in OS No. PF 69 of 1984.

Such was the state of the parties when OS No. PF 69 of 1984 came up for hearing before me while judgment on OS No. 3 of 1984 was being reserved.

The grounds of judgment herein will apply to both summonses and I will refer to arguments of learned Counsel as if both summonses were heard together.

I now revert to the facts. In both relevant memoranda of charges and the annexures attached thereto, which set out the terms in detail, the charges were expressly stated to be created for securing money lent to one Foo Tat Industries Sdn. Bhd. (the Borrowing Company) in the case of the 1st Chargor's charge, in the sum of RM151,926.50; and in the case of the 2nd Chargor's charge, RM70,794. The annexures attached to both charges were in the apparently standard printed form normally used by bankers and their borrowers for money to be lent by way of overdrawing or overdraft facility, secured by a charge over borrower's land. In fact, in both annexures, interest chargeable on both sums aforesaid was stated therein to be 14% per annum.

In the first place, both chargors complained that the Borrowing Company never borrowed the sums respectively as mentioned above, or any sum at all. The Chargors before me agreed that it was indeed all a mistake for the charge documents to be drawn up in the way they were drawn up. Both the Chargee and the Chargors agreed that the intention in common of all or the intended transaction among them was that the charges in question were to be created to secure payment of rent by the Borrowing Company to the Chargee over the "leasing" of certain machinery hired to the Borrowing Company by the Chargee and of such Borrowing Company, both chargors were directors as well as guarantors for the Borrowing Company in the matter of the leasing of the machinery in question as evidenced by agreements therefor, executed between the Borrowing Company and the Chargee and headed with the words:- "Equipment Lease Agreement".

I would pause to observe, that a lease has always denoted a grant of an interest in land in law, but for some years now, the commercial world has borrowed the legal term to refer to the hiring of chattels from the so called leasing companies to hirers for whom such leasing companies will purchase the chattels for the purpose of hiring the same subsequently to the hirers.

The use of this legal term for an originally wrong legal reason has not apparently led to any confusion. The Court would recognise its extended meaning and the transactions it covers as part of law of merchant if it has not already been so recognised.

In a nutshell, both the Chargors and the Chargee agreed that it was a mutual mistake; and that the charge documents did not truly express their intention. The Court was inexorably driven to the conclusion after hearing the parties that there was a mistake in framing the charge documents, and that the intention of all parties was that the charges were created to secure payment of the rent by the Borrowing Company to the Chargee. Should not the Court exercise its discretion in ordering rectification? All the factors after all fitted squarely into s. 30 of the Specific Relief Act 1950, which provides as follows:

> 30. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Before the Court dealt with the question of the exercise of such discretion in the way it finally did, it would be convenient at this stage to dispose of a few contentions emanating from the Chargors. First, it was contended that no parol evidence was admissible to contradict the statement or assertion in the charge documents, that the charges were created to secure loans given to the Borrowing Company respectively. Section 92(a) of the Evidence Act 1950, which is set out as follows, would be a complete answer. Section 92(a) states:

> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:-
>
> Provided that-
>
> (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, **or mistake in fact or law;**

Section 92(a) would be in line, in regard to rectification of documents, with cases such as *Lovell & Christines Ltd. v. Wall* [1911] 104 LT 85.

Secondly, the Chargors argued that since the machinery, the subject matter of the leasing agreement, was destroyed in a fire at a factory of the Borrowing Company which took place on 11 February 1983, the leasing agreements were thus "frustrated", so that nothing more could be said of them, or the rent payable thereunder, invoking the doctrine of frustration. Counsel's submission was, of course, an allusion to the classic case of *Taylor v. Caldwell* [1863] 3 B. & S. 826, of which students of the law are much enamoured, and in which, a music hall was destroyed by fire before it could be used but after the contract to use it was made. The owner was held disentitled to claim anything on the ground that there was an implied condition that the music hall must continue to exist for obligations to be enforceable.

In *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] AC 696, the House of Lords formulated the test for the doctrine of frustration. Lord Reid said at page 721:

> ... The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

Such a complex matter was put so neatly by him, and in so few words! The test behoves one to construe the terms which are already in the contract itself first. Following on the heels of this, one must revert to "Article" 13, paras. (2) and (4) of the "Equipment Lease Agreement" which would appear to have a direct bearing on the question of liability for rent after such a fire.

Article 13 paras. (2) and (4) provided as follows:

> Article 13. (Loss and Damage to Equipment)
>
> (1) x x x x
>
> (2) In the event of any loss or damage to the Equipment the Lessee, at its cost and expense and at the option of the Lessor, shall forthwith:-
>
> (a) reinstate the Equipment with like equipment in good repair, condition and working order:
>
> or
>
> (b) reinstate the Equipment and render it in good repair, condition and working order.
>
> (3) x x x x
>
> (4) In the event of paragraph (2) of this Article applying, this Lease Agreement shall continue to have full force and effect without any amendment and in particular the Rent shall continue to be payable in full.

On a true construction of the quoted provisions, rent continued to be payable in full after the fire. Since that was so, the charge documents which were executed in fact by the parties herein for securing payment of such rent, would continue to remain in force (apart from the mutual mistake for which rectification was sought) because the contracts or the leasing agreements in question, were not only wide enough to apply to the new situation, i.e. the fire, but had so obviously stipulated for the destruction of the said machinery for any untoward incident such as fire.

Thirdly it was argued for the chargors, that some insurance company, on account of the fire, had paid the chargee a sum of RM195,541. The receipt by Chargee of such insurance money, it was contended, "had brought an end to the leasing agreement". This contention, I am afraid, had no substance in view of Article 15 of the lease agreement which is reproduced as follow:

> Article 15. (Receipt of Insurance Proceeds)
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> (1) The Lessor shall be entitled to receive all insurance proceeds and moneys if and when any event covered by insurance occurs and if applicable the Lessee hereby irrevocably appoints the Lessor the agent of the Lessee for the purpose of receiving all or any of such proceeds and moneys and giving a discharge therefor.
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> (2) The proceeds and moneys of such insurance, at the option of the Lessor, shall be applied towards any or all of the following:-
>
> (a) towards payment of any costs and expenses incurred or to be incurred pursuant to sub-paragraphs (a) and (b) of paragraph (2) of Article 13;
>
> (b) towards payment of the Stipulated Loss Value of any part thereof pursuant to paragraph (3) of Article 13 in which event the Lessee will be relieved from its liability to pay the Stipulated Loss Value to the extent of the insurance proceeds and moneys actually received by the Lessor; and
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> (c) towards payment of damages to any third party or the Lessee due to the occurrence of the event covered by insurance.

(3) If and when events covered by any insurance should occur, the Lessee shall immediately notify the Lessor thereof in writing and shall deliver to the Lessor without delay all documents for the receipt of all insurance proceeds and moneys.

Article 15 made it abundantly clear that such insurance money was for purposes not including any indemnity to the Borrowing Company in the matter of rent or arrears of rent the liability for which survived the fire.

I now refer to the draft form of rectified charge documents produced by the Chargor as annexed to its application. It is to be borne in mind that one Lim Jut Pian, the accountant in the employ of the Chargee who alone made all affidavits filed in these proceedings for the Chargee had repeatedly and unequivocally stated that the charges in question were raised for the purpose of securing the payment of rent, and the chargors submitted to the same effect.

The Chargee sought to amend p. 1 of the memoranda of charges (From 16A of the National Land Code) which the parties had executed earlier for the expressly stated purpose of securing the repayment of the loans in question by substituting therefor the following words to the effect, that the charges were executed in consideration of the Chargee agreeing, at the request of the Chargors, to advance money or continue to advance money, not fixed in amounts, or to give facility, or loan or to provide money, all in unfixed amounts, to the Borrowing Company for so long as the Chargee thought fit until the total amounts reached RM151,926.50 and RM70,794 respectively for both charges respectively. The annexures to both charges were to be similarly amended to provide, in extenso, detailed obligations of such loans, advances and facilities in the same vein as those proposed words to be filled in on the said page 1.

It will be seen that the proposed drafts for the purpose of rectification were in serious contradiction with the professed intention of all parties to secure payment of rent by Borrowing Company to the Chargee which the defective and original charge documents, sought to be rectified, failed to reflect. Such proposed drafts of charge documents were exactly similar in nature to those defective ones, and would appear to be, even more defective, because the drafts were more elaborately drawn to extend to more situations, save the solitary purpose of securing the payment of rent for hire of the machinery.

What could be the reasons for this extraordinary state of affairs? One thing was beyond doubt and that was that these draft documents were deliberately drawn up in this way with full knowledge of the Chargee's limited entitlement to amend the charge documents for the only purpose of securing the rent for the machinery, the motive being presumably to provide even more protection for itself. All this would amount clearly, in my view, to an abuse of the remedy of rectification should the Court be minded to grant it. Should the Court allow such an abuse?

Perhaps the Chargee had overlooked the discretionary nature of this remedy, and maybe it did not realise fully that such conduct would neither be fair nor just to the Chargors herein. Clearly the Chargee was not prepared to do equity when it sought equity.

I therefore exercised my discretion by refusing the rectification sought for and granted the declaration that both charges were null and void and ordered, unconditionally, the Chargee to execute the relevant valid and registrable discharges of charges and to return the relevant documents of titles. I made the appropriate orders to give effect to the same in the respective originating summonses with costs to the Chargors.

Also found at [1986] 1 CLJ 604